

**APPENDIX A****COMMENTERS (2000)**

1. AT&T Corporation
2. Cablevision Systems Corporation
3. Charter Communications, Inc.
4. Comcast Cable Communications, Inc.
5. Consumer Electronics Association
6. Consumer Electronics Retailers Coalition
7. Cox Communications, Inc.
8. DIVA Systems Corporation
9. Gemstar-TV Guide International, Inc., *et al.*
10. Matsushita Electric Corporation of America d/b/a Panasonic
11. MediaCom Communication, *et al.*
12. Motion Picture Association of America
13. Motorola, Inc.
14. National Cable and Telecommunications Association
15. Philips Electronics North America Corporation
16. Scientific-Atlanta
17. Telecommunications Industry Association
18. Time Warner Cable
19. TiVo, Inc.
20. Veridian Corporation
21. WorldGate Communications, Inc.

**REPLY COMMENTERS (2000)**

1. Adelphia Communications Corporation
2. Association for Maximum Service Television
3. AT&T Corporation
4. Charter Communications, Inc.
5. Consumer Electronics Association
6. Consumer Electronics Retailers Coalition
7. Information Technology Industry Council
8. King County, Washington and National Association of Telecommunications Officers and Administrators
9. Motion Picture Association of America
10. Motorola, Inc.
11. National Cable and Telecommunications Association
12. Scientific-Atlanta
13. Time Warner Cable

**COMMENTERS (2004)**

1. Consumer Electronics Association and Consumer Electronics Retailers Coalition
2. National Cable and Telecommunications Association

**REPLY COMMENTERS (2004)**

1. Consumer Electronics Association and Consumer Electronics Retailers Coalition
2. DIRECTV, Inc.
3. National Cable and Telecommunications Association
4. Sony Electronics Inc.

**APPENDIX B**

Part 76 of the Code of Federal Regulations is amended as follows:

**PART 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE**

1. The authority for Part 76 continues to read as follows:

**AUTHORITY:** 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 317, 325, 338, 339, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 531, 571, 572, and 573.

2. Section 76.1204(a) is amended by revising paragraph (a)(1) to read as follows:

**§ 76.1204 Availability of equipment performing conditional access or security functions.**

(a)(1) A multichannel video programming distributor that utilizes navigation devices to perform conditional access functions shall make available equipment that incorporates only the conditional access functions of such devices. Commencing on July 1, 2007, no multichannel video programming distributor subject to this section shall place in service new navigation devices for sale, lease, or use that perform both conditional access and other functions in a single integrated device.

## APPENDIX C FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),<sup>1</sup> an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated into the *Order and Further Notice of Proposed Rulemaking* ("Extension Order").<sup>2</sup> The Commission sought written public comment on the proposals in the *Extension Order*, including comment on the IRFA. No comments were received on the IRFA. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.<sup>3</sup>

**A. Need for, and Objectives of, the Order.** Section 629 of the Communications Act of 1934, as amended (the "Act"), requires the Commission to develop rules to assure commercial availability of navigation devices used in conjunction with services provided by multichannel video programming distributors ("MVPDs").<sup>4</sup> The statutory objective of Section 629 is to assure that navigation devices used by consumers to access a particular MVPD's programming are available to consumers from manufacturers, retailers, and other vendors not affiliated with that MVPD. To this end, the Commission adopted a January 1, 2005 deadline for MVPDs to cease deploying new navigation devices that perform both conditional access functions and other functions in a single integrated device.<sup>5</sup> Requiring MVPDs to separate the conditional access function from the basic navigation device (the "host" device) was intended to permit unaffiliated manufacturers, retailers, and other vendors to commercially market host devices while allowing MVPDs to retain control over their system security. In the *Further Notice of Proposed Rulemaking and Declaratory Ruling*, the Commission indicated that it would reassess the need for the 2005 separation deadline in light of the evolving marketplace for navigation devices.<sup>6</sup> In response, the cable industry and set-top box manufacturers generally urged that the 2005 deadline should be eliminated in favor of the continued offering of integrated navigation devices for rent to consumers. Other equipment manufacturing and retail interests urged that the date should be advanced to ensure the timely development of a retail market in host devices. After the *Further Notice and Declaratory Ruling* was issued, the cable and consumer electronics industries reached a memorandum of understanding ("MOU") on a cable compatibility standard for a unidirectional digital cable television receiver with host device functionality, as well as other unidirectional digital cable products. The Commission sought comment on this standard, which would allow consumers to directly attach their DTV receivers to cable systems using a point of deployment ("POD") module and receive one-way cable television services without the need for an external navigation device.<sup>7</sup> In light of the ongoing notice and comment cycle on the FNPRM and the ongoing status of the negotiations between the cable and consumer electronic industries on specifications for bidirectional digital cable receivers and products, the Commission extended the separation deadline until July 1, 2006.

<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 18 FCC Rcd 7924 (2003) ("Extension Order").

<sup>3</sup> See 5 U.S.C. § 604.

<sup>4</sup> 47 U.S.C. § 549.

<sup>5</sup> *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14793 (1998) ("First Report and Order").

<sup>6</sup> *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 15 FCC Rcd 18199 (2000) ("Further Notice and Declaratory Ruling").

<sup>7</sup> *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices and Compatibility Between Cable Systems and Consumer Electronics Equipment*, 18 FCC Rcd 518 (2003) ("FNPRM").

This *Second Report and Order* concludes that the current level of competition in the navigation device market is not sufficient to assure the commercial availability of navigation devices. The *Second Report and Order* thus maintains the requirement that cable operators separate security and non-security functions in the devices they provide on a lease or sale basis, but extends the separation deadline until July 1, 2007.<sup>8</sup> The one-year extension is intended to afford cable operators additional time to develop a downloadable security solution that will allow common reliance by cable operators and consumer electronics manufacturers on an identical security function without the potentially costly physical separation of the conditional access element.

The *Second Report and Order* also establishes several reporting deadlines, primarily applicable to the cable industry. First, the *Second Report and Order* requires that by December 1, 2005, the cable industry report to the Commission on the feasibility of implementing software-based conditional access in navigation devices. Second, beginning August 1, 2005 and every 90 days thereafter, the National Cable and Telecommunications Association and the Consumer Electronics Association must report to the Commission on the status of the ongoing negotiations regarding specifications for bidirectional digital cable receivers. Finally, beginning August 1, 2005 and every 60 days thereafter, Comcast Corporation, Time Warner Cable, Cox Communications, Charter Communications, Adelphia Cable, and Cablevision must file with the Commission reports detailing CableCARD deployment and support. These reporting requirements are intended to ensure that the one-year extension of the separation deadline does not adversely impact competition in the navigation devices market.

**B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA.** There were no comments filed that specifically addressed the rules and policies proposed in the IRFA.

**C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply.** The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.<sup>9</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>10</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>11</sup> A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").<sup>12</sup>

The requirements contained in this *Second Report and Order* are intended to require MVPDs to cease deploying integrated navigation devices by July 1, 2007 and to file status reports related to navigation devices. Therefore, MVPDs, which includes Cable and other Program Distributors and

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<sup>8</sup> The Commission had previously sought comment on whether a new integration ban deadline was appropriate. *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 15 FCC Rcd 18199, 18202-03 (2000); *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 18 FCC Rcd 7924, 7926 (2003).

<sup>9</sup> 5 U.S.C. § 603(b)(3).

<sup>10</sup> 5 U.S.C. § 601(6).

<sup>11</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies, "unless an agency, after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

<sup>12</sup> 15 U.S.C. § 632.

Satellite Carriers, will be directly and primarily affected by the proposed rules. In addition, because we require status reports to be submitted by the Consumer Electronics Association on behalf of consumer electronics manufacturers, the rules will also directly affect consumer electronics manufacturers. Therefore, in this FRFA, we consider the impact of the rules on small cable operators, small consumer electronics manufacturers, and other small entities. A description of such small entities, as well as an estimate of the number of affected small entities, is provided below.

*Cable and Other Program Distribution.* Cable system operators fall within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating \$12.5 million or less in revenue annually.<sup>13</sup> According to the Census Bureau data for 1997, there were a total of 1,311 firms that operated for the entire year in the category of Cable and Other Program Distribution. Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more, but less than \$25 million.<sup>14</sup> The Commission therefore estimates that the majority of providers in this category of Cable and Other Program Distribution are small businesses.

*Cable System Operators (Rate Regulation Standard).* The Commission has developed, with SBA's approval, its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.<sup>15</sup> An estimated 1,439 cable operators qualified as small cable companies at the end of 1995.<sup>16</sup> Since then, some of these companies may have grown to serve more than 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the rules in this *Second Report and Order*.

*Cable System Operators (Communications Act Standard).* The Act also contains a size standard for a "small cable operator," which is defined as "a cable operators that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>17</sup> The Commission has determined that there are 67.7 million cable subscribers in the United States.<sup>18</sup> Therefore, a cable

<sup>13</sup> 13 C.F.R. § 121.201, NAICS code 517510.

<sup>14</sup> U.S. Census Bureau, 1997. Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Subject Series—Establishment and Firm Size, Information Sector 51, Table 4 at 50 (2000). The amount of \$10 million was used to estimate the number of small business firms because the relevant Census categories stopped at \$9,999,999 and began at \$10,000,000. No category for \$12.5 million existed. Thus, the number is as accurate as it is possible to calculate, given the available information.

<sup>15</sup> 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of \$100 million or less. For "regulatory simplicity," the Commission established the company size standard in terms of subscribers, rather than dollars; in the cable context, 400,000 subscribers equates to approximately \$100 million in annual regulated revenues. See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 10 FCC Rcd 7393, 7408-09 (1995).

<sup>16</sup> Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figured for Dec. 30, 1995).

<sup>17</sup> 47 U.S.C. § 543(m)(2).

<sup>18</sup> See *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, 16 FCC Rcd 2225 (2001) ("2001 Subscriber Count Public Notice"). In the 2001 Subscriber Count Public Notice, the Commission established the threshold for determining whether a cable operator meets the definition of small cable operator at 677,000 subscribers, and determined that this threshold will remain in effect until and unless the Commission issues a superceding public notice. We recognize that the number of cable subscribers in the United States was estimated by the Commission in June 2004 to be almost 66.1 million. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 05-13 ("2005 Cable Competition Report"). However, because

operator serving fewer than 677,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>19</sup> Based on available data, we estimate that the number of cable operators serving fewer than 677,000 subscribers is approximately 1,450. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.<sup>20</sup> We are, therefore, unable at this time to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Act.

*Direct Broadcast Satellite ("DBS") Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Cable and Other Program Distribution.<sup>21</sup> This definition provides that a small entity is one with \$12.5 million or less in annual receipts.<sup>22</sup> Currently, only four operators hold licenses to provide DBS service, which requires a great investment of capital for operation. All four currently offer subscription services. Two of these four DBS operators, DirecTV<sup>23</sup> and EchoStar Communications Corporation ("EchoStar"),<sup>24</sup> report annual revenues that are in excess of the threshold for a small business. A third operator, Rainbow DBS, is a subsidiary of Cablevision's Rainbow Network, which also reports annual revenues in excess of \$12.5 million, and thus does not qualify as a small business.<sup>25</sup> The fourth DBS operator, Dominion Video Satellite, Inc. ("Dominion"), offers religious (Christian) programming and does not report its annual receipts.<sup>26</sup> The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we acknowledge the possibility that there are entrants in this field that may not yet have generated \$12.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

*Fixed-Satellite Service ("FSS").* The FSS is a radiocommunication service between earth stations at a specified fixed point or between any fixed point within specified areas and one or more satellites.<sup>27</sup> The FSS, which utilizes many earth stations that communicate with one or more space

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the Commission has not issued a public notice subsequent to the *2001 Subscriber Count Public Notice*, we propose to rely on the subscriber count threshold established by the *2001 Subscriber Count Public Notice*.

<sup>19</sup> 47 C.F.R. § 76.901(f).

<sup>20</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to Section 76.901(f) of the Commission's rules. See 47 U.S.C. § 573; 47 C.F.R. § 76.901(f).

<sup>21</sup> 13 C.F.R. § 121.201, NAICS code 517510.

<sup>22</sup> *Id.*

<sup>23</sup> DirecTV is the largest DBS operator and the second largest MVPD, serving an estimated 13.04 million subscribers nationwide; see Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Eleventh Annual Report*, FCC 05-13, ¶ 55 (rel. Feb. 4, 2005) ("*2005 Cable Competition Report*").

<sup>24</sup> EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and the fourth largest MVPD, serving an estimated 10.12 million subscribers nationwide. *Id.*

<sup>25</sup> Rainbow DBS, which provides service under the brand name VOOOM, reported an estimated 25,000 subscribers. *Id.*

<sup>26</sup> Dominion, which provides service under the brand name Sky Angel, does not publicly disclose its subscribership numbers on an annualized basis. *Id.*

<sup>27</sup> See 47 C.F.R. § 2.1(c).

stations, may be used to provide subscription video service. Therefore, to the extent FSS frequencies are used to provide subscription services, FSS falls within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating \$12.5 million or less in revenue annually.<sup>28</sup> Although a number of entities are licensed in the FSS, not all such licensees use FSS frequencies to provide subscription services. Two of the DBS licensees (EchoStar and DirecTV) have indicated interest in using FSS frequencies to broadcast signals to subscribers. It is possible that other entities could similarly use FSS frequencies, although we are not aware of any entities that might do so.

*Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems.* PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments or condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for Cable and Other Program Distribution Services includes PCOs and, thus, small entity PCOs are defined as all such companies generating \$12.5 million or less in annual receipts.<sup>29</sup> Currently, there are approximately 135 members of the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.<sup>30</sup> Individual PCOs often serve approximately 3,000-4,000 subscribers, but the larger operations may serve as many as 15,000-55,000 subscribers. In total, PCOs currently serve approximately 1.1 million subscribers.<sup>31</sup> Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCOs qualify as small entities.

*Other Program Distribution.* The SBA-recognized definition of Cable and Other Program Distribution includes other MVPDs, such as HSD, MDS/MMDS, ITFS, LMDS, and OVS. This definition provides that a small entity is one with \$12.5 million or less in annual receipts.<sup>32</sup> As previously noted, according to the Census Bureau data for 1997, there were a total of 1,311 firms that operated for the entire year in the category of Cable and Other Program Distribution. Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more, but less than \$25 million.<sup>33</sup> The Commission estimates, therefore, that the majority of providers in this category of Cable and Other Program Distribution are small businesses.

*Home Satellite Dish ("HSD") Service.* Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating \$12.5 million or less in revenue annually.<sup>34</sup> HSD or the large dish segment of the

<sup>28</sup> 13 C.F.R. § 121.201, NAICS code 517510.

<sup>29</sup> 13 C.F.R. § 121.201, NAICS code 517510.

<sup>30</sup> See 2005 Cable Competition Report, FCC 05-13, ¶110. Previously, the Commission reported that IMCC has 250 members. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 FCC Rcd 1606, 1666 (2004) ("2004 Cable Competition Report").

<sup>31</sup> See 2005 Cable Competition Report, FCC 05-13, ¶110.

<sup>32</sup> 13 C.F.R. § 121.201, NAICS code 517510.

<sup>33</sup> U.S. Census Bureau, 1997. Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Subject Series—Establishment and Firm Size, Information Sector 51, Table 4 at 50 (2000). The amount of \$10 million was used to estimate the number of small business firms because the relevant Census categories stopped at \$9,999,999 and began at \$10,000,000. No category for \$12.5 million existed. Thus, the number is as accurate as it is possible to calculate, given the available information.

<sup>34</sup> 13 C.F.R. § 121.201, NAICS code 517510.

satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry over 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data shows that, between June 2003, and June 2004, HSD subscribership fell from 502,191 subscribers to 335,766 subscribers, a decline of more than 33 percent.<sup>35</sup> The Commission has no information regarding the annual revenue of the four C-Band distributors.

*Wireless Cable Systems.* Wireless cable systems use the Multipoint Distribution Service ("MDS")<sup>36</sup> and Instructional Television Fixed Service ("ITFS")<sup>37</sup> frequencies in the 2 GHz band to transmit video programming and provide broadband services to subscribers. Local Multipoint Distribution Service ("LMDS") is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.<sup>38</sup> As previously noted, the SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating \$12.5 million in annual receipts, appears applicable to MDS, ITFS and LMDS. In addition, the Commission has defined small MDS and LMDS entities in the context of Commission license auctions.

In the 1996 MDS auction,<sup>39</sup> the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years.<sup>40</sup> This definition of a small entity in the context of MDS auctions has been approved by the SBA.<sup>41</sup> In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities.<sup>42</sup> MDS licensees and wireless cable operators that did not participate in the

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<sup>35</sup> See 2005 Cable Competition Report, FCC 05-13, ¶ 64. HSD subscribership declined more than 28 percent between June 2002 and June 2003. See 2004 Cable Competition Report, 19 FCC Rcd 1654-55, ¶¶ 73-4.

<sup>36</sup> MDS, also known as Multichannel Multipoint Distribution Service ("MMDS"), is regulated by Part 21 of the Commission's rules; see 47 C.F.R. Part 21, subpart K; and has been renamed the Broadband Radio Service (BRS); see Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands; Part 1 of the Commission's Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico; 19 FCC Rcd 14165 (2004) ("*MDS/ITFS Order*").

<sup>37</sup> ITFS systems are regulated by Part 74 of the Commission's rules; see 47 C.F.R. Part 74, subpart I. ITFS, an educational service, has been renamed the Educational Broadband Service (EBS); see *MDS/ITFS Order*, 19 FCC Rcd 14165. ITFS licensees, however, are permitted to lease spectrum for MDS operation.

<sup>38</sup> See Local Multipoint Distribution Service, 12 FCC Rcd 12545 (1997) ("*LMDS Order*").

<sup>39</sup> MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996. (67 bidders won 493 licenses.)

<sup>40</sup> 47 C.F.R. § 21.961(b)(1).

<sup>41</sup> See *ITFS Order*, 10 FCC Rcd at 9589.

<sup>42</sup> 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of



MDS auction must rely on the SBA definition of small entities for Cable and Other Program Distribution. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of \$12.5 million annually. Therefore, we estimate that there are approximately 850 small MDS providers as defined by the SBA and the Commission's auction rules.

While SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities.<sup>43</sup> There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, the Commission estimates that at least 1,932 ITFS licensees are small businesses.

In the 1998 and 1999 LMDS auctions,<sup>44</sup> the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years.<sup>45</sup> Moreover, the Commission added an additional classification for a "very small business," which was defined as an entity that had annual average gross revenues of less than \$15 million in the previous three calendar years.<sup>46</sup> These definitions of "small business" and "very small business" in the context of the LMDS auctions have been approved by the SBA.<sup>47</sup> In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, we believe that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

In sum, there are approximately a total of 2,000 MDS/MMDS/LMDS stations currently licensed. Of the approximate total of 2,000 stations, we estimate that there are 1,595 MDS/MMDS/LMDS providers that are small businesses as deemed by the SBA and the Commission's auction rules.

*Open Video Systems ("OVS").* The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,<sup>48</sup> OVS falls within the SBA-recognized definition of Cable and Other Program Distribution Services, which provides that a small entity is one with \$ 12.5 million or less in annual receipts.<sup>49</sup> The Commission has certified 25 OVS operators with some now providing service. Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer

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Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standards for "other telecommunications" (annual receipts of \$12.5 million or less). See 13 C.F.R. § 121.201, NAICS code 517910.

<sup>43</sup> In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

<sup>44</sup> The Commission has held two LMDS auctions: Auction 17 and Auction 23. Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998. (104 bidders won 864 licenses.) Auction No. 23, the LMDS re-auction, began on April 27, 1999, and closed on May 12, 1999. (40 bidders won 161 licenses.)

<sup>45</sup> See *LMDS Order*, 12 FCC Red at 12545.

<sup>46</sup> *Id.*

<sup>47</sup> See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, SBA (January 6, 1998).

<sup>48</sup> See 47 U.S.C. § 573.

<sup>49</sup> 13 C.F.R. § 121.201, NAICS code 517510.

video programming services.<sup>50</sup> As of June 2003, BSPs served approximately 1.4 million subscribers, representing 1.49 percent of all MVPD households.<sup>51</sup> Among BSPs, however, those operating under the OVS framework are in the minority, with approximately eight percent operating with an OVS certification.<sup>52</sup> Serving approximately 460,000 of these subscribers, Affiliates of Residential Communications Network, Inc. ("RCN") is currently the largest BSP and 11th largest MVPD.<sup>53</sup> RCN received approval to operate OVS systems in New York City, Boston, Washington, D.C. and other areas. The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

*Electronics Equipment Manufacturers.* Rules adopted in this proceeding could apply to manufacturers of DTV receiving equipment and other types of consumer electronics equipment. The SBA has developed definitions of small entity for manufacturers of audio and video equipment<sup>54</sup> as well as radio and television broadcasting and wireless communications equipment.<sup>55</sup> These categories both include all such companies employing 750 or fewer employees. The Commission has not developed a definition of small entities applicable to manufacturers of electronic equipment used by consumers, as compared to industrial use by television licensees and related businesses. Therefore, we will utilize the SBA definitions applicable to manufacturers of audio and visual equipment and radio and television broadcasting and wireless communications equipment, since these are the two closest NAICS Codes applicable to the consumer electronics equipment manufacturing industry. However, these NAICS categories are broad and specific figures are not available as to how many of these establishments manufacture consumer equipment. According to the SBA's regulations, an audio and visual equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern.<sup>56</sup> Census Bureau data indicates that there are 554 U.S. establishments that manufacture audio and visual equipment, and that 542 of these establishments have fewer than 500 employees and would be classified as small entities.<sup>57</sup> The remaining 12 establishments have 500 or more employees; however, we are unable to determine how many of those have fewer than 750 employees and, therefore, also qualify as small entities under the SBA definition. Under the SBA's regulations, a radio and television broadcasting and wireless communications equipment manufacturer must also have 750 or fewer employees in order to qualify as a small business concern.<sup>58</sup> Census Bureau data indicates that there are 1,215 U.S. establishments that manufacture radio and television broadcasting and wireless communications equipment, and that 1,150 of these establishments have fewer than 500 employees and would be classified

<sup>50</sup> See 2005 Cable Competition Report, FCC 05-13, ¶ 71.

<sup>51</sup> See 2004 Cable Competition Report, 19 FCC Rcd at 1659-60, ¶¶ 80-1.

<sup>52</sup> See 2005 Cable Competition Report, FCC 05-13, ¶ 71.

<sup>53</sup> *Id.* WideOpenWest is the second largest BSP and 15th largest MVPD, with cable systems serving about 288,000 subscribers as of September 2003. The third largest BSP is Knology, which currently serves approximately 174,957 subscribers as of June 2004; see 2005 Cable Competition Report, FCC 05-13, ¶ 71.

<sup>54</sup> 13 C.F.R. § 121.201, NAICS code 334310.

<sup>55</sup> 13 C.F.R. § 121.201, NAICS code 334220.

<sup>56</sup> 13 C.F.R. § 121.201, NAICS code 334310.

<sup>57</sup> Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Industry Series—Manufacturing, Audio and Video Equipment Manufacturing, Table 4 at 9 (1999). The amount of 500 employees was used to estimate the number of small business firms because the relevant Census categories stopped at 499 employees and began at 500 employees. No category for 750 employees existed. Thus, the number is as accurate as it is possible to calculate with the available information.

<sup>58</sup> 13 C.F.R. § 121.201, NAICS code 334220.

as small entities.<sup>59</sup> The remaining 65 establishments have 500 or more employees; however, we are unable to determine how many of those have fewer than 750 employees and, therefore, also qualify as small entities under the SBA definition. We conclude, therefore, that there are no more than 542 small manufacturers of audio and visual electronics equipment and no more than 1,150 small manufacturers of radio and television broadcasting and wireless communications equipment for consumer/household use.

**D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements.** This *Second Report and Order* amends Section 76.1204 of the Commission's rules to require MVPDs to cease deploying new navigation devices that perform both conditional access functions and other functions in a single integrated device by July 1, 2007.<sup>60</sup> Section 76.1204(a) already requires MVPDs to cease deploying integrated devices.<sup>61</sup> The *Second Report and Order* extends the deadline from July 1, 2006 to July 1, 2007. To the extent that compliance may require the manufacture and purchase of non-integrated host devices by MVPDs by July 1, 2007, the present action does not impose any new requirements on consumer electronics equipment manufacturers or MVPDs, but rather extends the existing compliance date by one year. We believe that the resulting impact on small entities is favorable to the extent that it provides them with additional time to come into compliance with the prohibition on integrated devices.

The *Second Report and Order* also requires that: (a) by December 1, 2005, the cable industry shall file with the Commission a report regarding the feasibility of implementing downloadable security in set-top boxes; (b) beginning August 1, 2005, and every 60 days thereafter, the National Cable and Telecommunications Association and the Consumer Electronics Association shall file with the Commission reports on progress in bidirectional talks and a software-based conditional access agreement; and (c) beginning August 1, 2005, and every 90 days thereafter, Comcast Corporation, Time Warner Cable, Cox Communications, Charter Communications, Adelphia Cable, and Cablevision shall file with the Commission reports detailing CableCARD deployment and support.

**E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered.** The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>62</sup>

To the extent that compliance with the amended prohibition deadline may require the manufacture and purchase of non-integrated host devices by MVPDs by July 1, 2007, the present action does not impose any new requirements on consumer electronics equipment manufacturers or MVPDs, but rather extends the existing compliance date by one year. We believe that the resulting impact on small entities is favorable to the extent that it provides them with additional time to come into compliance with the prohibition on

<sup>59</sup> Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Industry Series—Manufacturing, Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, Table 4 at 9 (1999). The amount of 500 employees was used to estimate the number of small business firms because the relevant Census categories stopped at 499 employees and began at 500 employees. No category for 750 employees existed. Thus, the number is as accurate as it is possible to calculate with the available information.

<sup>60</sup> See Appendix B.

<sup>61</sup> See 47 C.F.R. § 76.1204(a).

<sup>62</sup> 5 U.S.C. § 603(c)(1)-(4).

integrated devices. When the original prohibition deadline was adopted, we noted, *inter alia*, that Section 629 includes provisions which may lessen compliance impact on small entities, including Section 629(c), which specifies that the Commission shall waive its implementing regulations when necessary for an MVPD to develop new or improved services, and Section 629(e), which requires the Commission to sunset its implementing rules when certain conditions are met.<sup>63</sup>

With respect to the reporting requirements imposed on cable operators and consumer electronics manufacturers, we believe that these reports are a critical complement to the extension of the integration ban deadline. We also believe that these requirements are unlikely to impose a burden on small entities. First, the requirement to submit a report on the feasibility of downloadable security applies to the cable industry, but not to individual cable operators. We generally do not expect small cable operators to be actively involved in the preparation of such report. The requirement to submit reports detailing CableCARD deployment and support every 90 days, beginning August 1, 2005, applies only to specified large cable multiple system operators. Finally, the requirement to submit reports regarding progress in the bidirectional talks and a software-based conditional access agreement every 60 days, beginning August 1, 2005, does not apply to individual cable operators or consumer electronics manufacturers. We generally do not expect small cable operators or consumer electronics manufacturers to be actively involved in the preparation of such reports.

**F. Report to Congress.** The Commission will send a copy of the *Second Report and Order*, including this FRFA, in a report to Congress pursuant to the Congressional Review Act.<sup>64</sup> In addition, the Commission will send a copy of the *Second Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Second Report and Order* (or a summary thereof) will also be published in the Federal Register.<sup>65</sup>

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<sup>63</sup> *First Report and Order*, 13 FCC Rcd at 14842.

<sup>64</sup> See 5 U.S.C. § 801(a)(1)(A).

<sup>65</sup> See 5 U.S.C. § 604(b).